

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE GRAND JURY SUBPOENA	: : : : :	G.J. No. 10-127-02
----------------------------------	-----------------------	---------------------------

MEMORANDUM
(Redacted)

PRATTER, J.

NOVEMBER 13, 2012

In this grand jury matter, the Government seeks to compel the testimony of an attorney (hereinafter “Attorney”), over the objections of his former clients, a business organization and its president, who are now grand jury targets (collectively, “Intervenors”). Although the Government concedes that Attorney did act as counsel to Intervenors and that, therefore, some of the testimony it seeks would normally be covered by the attorney-client privilege, the Government contends that the crime-fraud exception applies – or may apply – to overcome the privilege. To bolster their argument that this exception applies, the Government seeks to have the Court interview Attorney *in camera* to question him about his relationship with Intervenors. For the following reasons, the Court will undertake an *in camera* interview with Attorney, reserving, of course, the question of whether the crime-fraud exception actually applies to vitiate Intervenors’ privilege.

FACTUAL AND PROCEDURAL BACKGROUND

The following factual and procedural background is necessarily limited by concerns for grand jury secrecy. To the extent that the Government has provided the Court with facts in support of its motion to compel by way of an *ex parte* declaration, those facts will not be disclosed herein.

A grand jury subpoena was served on Attorney, ordering him to appear and give testimony in relation to the grand jury investigation of Intervenors. Attorney previously acted as general counsel for Business-Intervenor. Attorney and Individual-Intervenor were also business partners for a brief period of time in a venture. Attorney, through his own counsel, advised the Government that he was not acting as a lawyer with respect to this brief foray into the business; however, Individual-Intervenor, through current his attorney, tells the Court that Attorney did act as a lawyer for the venture.

The government investigation of Intervenors centers on alleged violations of the Foreign Corrupt Practices Act, and, more specifically, on allegedly corrupt payments made indirectly to a foreign official, who facilitated consulting relationships between Intervenors and others. Attorney served as a legal advisor for Intervenors with respect to one such relationship during his tenure as general counsel to Business-Intervenor. According to the Government, some of the allegedly illegal payments were connected to that particular relationship and were made not long after Attorney served as a legal advisor with respect to that transaction. Far greater detail regarding the relationship as well as other transactions is provided in the Government's *ex parte* affidavit.

Believing at least part of his likely testimony regarding that deal and other transactions under investigation to be protected by the attorney-client privilege, Attorney informed the Government that he would not testify before the grand jury until the Court resolves the question of whether any exceptions apply that would allow him to testify as to those topics. The Government has now moved to compel Attorney's testimony and asks this Court to examine Attorney *in camera* to determine whether the crime-fraud exception to the attorney-client privilege applies. Intervenors have also moved (and were allowed) to intervene in this matter

and have filed briefs opposing not only Attorney's appearance before the grand jury but also any *in camera* examination of Attorney. Both the Government and counsel for Intervenors have fully briefed this issue, the Court has met with counsel to discuss the matter in Chambers, and oral argument was held.

LEGAL STANDARD

The attorney-client privilege, "one of the oldest recognized privileges for confidential communications," *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998), bars the disclosure of communications when:

“(1) legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection [may] be waived.”

In re Impounded, 241 F.3d 308, 316 n.6 (3d Cir. 2001) (quoting *In the Matter of the Grand Jury Empaneled February 14, 1978*, 603 F.2d 469, 474 (3d Cir. 1979)). “Courts have long viewed [the privilege’s] central concern as one to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *In re Grand Jury Investigation*, 445 F.3d 266, 273 (3d Cir. 2006).

The privilege, however, is not without limits. “Because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly.” *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991); *see also In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979) (“[B]ecause the privilege obstructs the search for truth and because its benefits are, at best, ‘indirect and speculative,’ it must be ‘strictly confined within the narrowest possible limits consistent with the logic of its principles.’” (quoting 8 Wigmore on Evidence § 2291, at 554)); *United States v. D’Amario*, 330 Fed. Appx. 409, 419 n.3 (3d Cir. 2009) (“[T]he attorney-client privilege is narrowly construed . . .”).

One such limit is the crime-fraud exception to the privilege. The crime-fraud exception to the attorney-client privilege applies when “(1) the client was committing or intending to commit a fraud or crime . . . and (2) the attorney-client communications were in furtherance of that alleged crime or fraud.” *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (2000) (internal citations omitted). The exception applies whether or not the attorney was actually aware that his or her advice was being used for nefarious purposes. *Clark v. United States*, 289 U.S. 1, 15 (1933). The precise evidentiary standard that applies to the analysis is a bit unclear, but the Third Circuit Court of Appeals has noted that the burden on the party seeking the exception “is not a particularly heavy one.” *In re Grand Jury Investigation*, 445 F.3d at 274.

As a threshold matter, however, the Court must first determine whether the Government has satisfied its burden to induce the Court to conduct an *in camera* examination of an attorney, to aid in determining whether the crime-fraud exception would apply to his testimony. In general, *United States v. Zolin*, 491 U.S. 554 (1989), sets forth the circumstances under which an *in camera* review of privileged documents may be conducted to assess whether the crime-fraud exception vitiates the privilege. In that case, which did not involve a grand jury proceeding, the Supreme Court held that a court may order an *in camera* review of allegedly privileged documents if the opponent of the privilege sets forth “a factual basis adequate to support a good faith belief by a reasonable person . . . that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.” *Id.* at 572 (internal quotations and citations omitted). The Court describes this showing as “not . . . a stringent one,” and goes on to state that once the opponent has made such a showing, “the decision whether to engage in *in camera* review rests in the sound discretion of the district court.” *Id.* In making this decision, a court may consider any nonprivileged information. *Id.* at 573-74.

DISCUSSION

A. The Government has not relied upon privileged information.

Intervenors first argue that the Government's motion contains privileged information, on which the Court cannot rely in deciding whether to conduct an *in camera* examination of Attorney. Specifically, the Government's motion states that "[Attorney]'s attorney has . . . advised that the information regarding [a transaction under investigation] may be subject to the crime-fraud exception to the attorney-client privilege." Gov't Mot. at ¶ 10. Intervenors contend that the statement by Attorney's counsel that the information "may be subject to the crime-fraud exception" reveals the nature of underlying privileged information and is therefore a breach of the attorney-client privilege held by Intervenors. Therefore, they argue that the statement of Attorney's counsel should not be considered in deciding whether an *in camera* interview is appropriate. The Intervenors also speculate that the *ex parte* declaration may contained other privileged information and ask that the Court not consider any such information in making its decision. Moreover, they argue that at a conference in Chambers, Attorney's counsel denied saying that the crime-fraud exception might apply in this matter, and that, therefore, even if that statement were not privileged, it should not be considered because it was not made.

The Government counters that the statement is not privileged because it does not reveal the substance of any attorney-client communications. Further, the Government also presents a somewhat circular argument that the Intervenors cannot prove that the statement was based on any privileged information because the crime-fraud exception may apply and, consequently, lead to the destruction of any claimed attorney-client privilege covering the information underlying the statement.¹

¹ The parties also disagree about whether, if the statement is privileged, any such disclosure of privileged information by Attorney would be allowed under Pennsylvania Rule of

To constitute a breach of the attorney-client privilege, a statement must, as both sides admit, reveal the client's confidences. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The [attorney-client] privilege only protects disclosure of communications"). The Court's reading of the statement, as informed by the conference with Attorney's counsel in Chambers, is rather more innocuous than Intervenor's reading. The statement does not reveal any communications between Attorney and Intervenor, but rather merely suggests that Attorney's counsel did not want to decide one way or another whether the crime-fraud exception applied. As the Court reads it, a statement that "the information regarding [a transaction under investigation] *may* be subject to the crime-fraud exception to the attorney-client privilege" also implies that the information *may not* be subject to the exception. A similarly equivocal statement could be made about any attorney-client relationship and is merely a reflection of the question the Government has asked the Court to answer. Thus, while the statement of Attorney's counsel is not privileged, neither does it lend much, if any, weight to the Government's argument for an *in camera* examination of Attorney. Moreover, the Court has examined the Government's *ex parte* submission and is satisfied that nothing in that declaration reveals privileged information. Therefore, the Intervenor's fear that, contrary to well-established law, the Court will rely on privileged information in determining whether to examine Attorney *in camera* is unfounded.

Professional Conduct 1.6, which permits disclosure of privileged information to "establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." The Government argues that this self-defense exception would apply to protect Attorney's disclosures simply because of Attorney's receipt of a grand jury subpoena, even in the absence of any charges against him. Intervenor counter that because the Government has made clear that Attorney is merely a witness and not a target of the investigation, the self-defense exception cannot apply. To make matters more complicated, neither the Government nor the Intervenor could tell the Court in which jurisdiction Attorney is admitted to practice law, or proffer any other pertinent information on the issue of which set of ethics rules would or should apply here. Ultimately, because the Court finds that the general statement is not privileged, it need not wade into this particular legal quagmire.

B. The Government has met its burden under *Zolin*.

Intervenors also argue that the Government has not “show[n] a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review . . . may reveal evidence to establish the claim that the crime-fraud exception applies.” *Zolin*, 491 U.S. at 574.

Specifically, they contend that the Government’s showing of temporal proximity between Attorney’s advice on a particular transaction and money transfers that the Government alleges were illegal payments connected to that transaction is simply not enough to show that Attorney’s advice was used to further this alleged crime, citing cases that deal not with whether to conduct an *in camera* review but with whether the crime-fraud exception had been proved. In so arguing, Intervenors conflate the test for seeking an *in camera* review with the test for proving that the crime-fraud exception actually applies.

While it is true that temporal proximity alone would not be enough to carry the day on the ultimate question on the table, the burden under *Zolin* to justify an *in camera* examination is, of necessity, significantly lower. *See Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96 (3d Cir. 1992). Indeed, the *Zolin* standard only requires that the proponent of the *in camera* examination set forth facts to support a “good faith belief” that *in camera* review “*may* reveal evidence” supporting the crime-fraud exception. *See Zolin*, 491 U.S. at 574 (emphasis added). To require a showing at this early stage that the attorney’s advice was actually used to further a crime or fraud would make little sense, as the very purpose of an *in camera* review is to determine whether any such evidence exists. Certainly a party seeking an *in camera* proceeding must do more than simply ask for one, but the Government here has provided enough information in its

ex parte declaration to support a good faith belief that examining Attorney *in camera* may reveal evidence that the crime-fraud exception applies.²

C. The same standard applies to both *in camera* examinations of documents and of witnesses.

Intervenors argue that even if the *Zolin* standard is met, an *in camera* examination of an attorney is much more intrusive than an examination of documents and would cause the Court to improperly impinge on the function of the grand jury. It is true that neither the Supreme Court nor the Third Circuit Court of Appeals has directly stated that an *in camera* examination of a live witness would or should be subject to the same standard as an *in camera* review of documents, either in the grand jury setting or otherwise.³ However, neither court has held that examining a live witness *in camera* warrants a different standard than *in camera* document review; they have simply not addressed the precise matter.

In the context of grand jury proceedings, the Third Circuit Court of Appeals has generally endorsed the use of *in camera* proceedings and *ex parte* affidavits to preserve grand jury secrecy and to determine whether the Government has made an adequate showing that an item subpoenaed for purposes of a grand jury is relevant to an investigation. *See In re Grand Jury*

² Intervenors also argue that the Government has presented no evidence that Attorney even knew about the allegedly fraudulent payments. However, as noted above, the crime-fraud exception may apply regardless of whether the attorney whose advice is used to perpetrate a crime or fraud knows about or participates in the crime or fraud itself. *See Clark*, 289 U.S. at 15.

³ The Court notes that in *In re Grand Jury Investigation*, 445 F.3d 226 (3d Cir. 2006), the Third Circuit Court of Appeals in setting forth the facts of the case noted that the district court had not only relied on an *ex parte* affidavit submitted by the Government to assess whether the Government had adequately carried its burden to prove that the crime-fraud exception applied, but had also heard testimony from the attorney to be questioned with the Government absent from the courtroom. This procedure was not at issue in the appeal and was only mentioned in passing; however, it appears that at least one court in this district *has* employed an *in camera* examination of sorts for purposes of assessing the application of the crime-fraud exception in a grand jury matter.

Subpoena, 223 F.3d. at 216. More specifically, it has also held that a court may use *ex parte* materials to determine whether the crime-fraud exception applies in the grand jury setting. *Id.* at 219. If anything, the court's openness to *in camera* and *ex parte* proceedings generally indicates that it would treat *in camera* examinations in a similar fashion.

A few other federal appellate courts have confronted requests for *in camera* examinations of attorneys and have allowed such a procedure after the Government met the *Zolin* test, each without questioning whether any other standard should apply because of the difference between document review and live testimony. Only one of these courts, the Second Circuit Court of Appeals, directly analyzed the propriety of such an examination in a grand jury setting. In that case, *In re John Doe, Inc.*, 13 F.3d 633 (2d Cir. 1994), the Second Circuit Court of Appeals upheld the district court's use of an *in camera* examination of a former attorney for purposes of assessing the crime-fraud exception, as well as the exclusion of the target's counsel from the examination. Prior to the examination, the judge met with the prosecutor to discuss the types of questions the prosecutor intended to ask in the grand jury, so the court reasoned that allowing the target to participate in the *in camera* examination would have been tantamount to revealing grand jury testimony. *Id.* at 637.⁴

The Eighth and Fifth Circuit Courts of Appeals have issued opinions discussing *in camera* examinations of attorneys in the grand jury setting, but in both of those cases the grand jury targets had not properly preserved their objections to the procedure employed by the district courts, and so neither court addressed the propriety of such an examination.⁵ *United States v.*

⁴ It is unclear whether the Government was allowed to be present for the examination of the attorney in that case.

⁵ In *In re Grand Jury Subpoena as to C97-216*, 187 F.3d 996 (8th Cir. 1999), the Eighth Circuit Court of Appeals described the procedure employed by the district court in conducting an *in camera* interview of an attorney in order to assess the application of the crime-fraud exception. The district court allowed the attorney's counsel to be present, but not the target's or

Boender, 649 F.3d 650 (7th Cir. 2011), was not a grand jury matter, but the Seventh Circuit Court of Appeals upheld a district court’s choice to allow both the defendant and the Government to attend the *in camera* examination of an attorney, ultimately leaving the question of whether or not an adversarial proceeding was appropriate to the discretion of the district court. *Id.* at 657-59. The court noted that the decision of how to conduct such an examination involves concerns of efficiency – “where the question is whether the government should be allowed to call a former attorney to testify, it may not be practical to determine whether the subjects of potential testimony are privileged without a preview of the government’s examination” – as well as concerns of compromising matters legitimately subject to the attorney-client privilege.

Like the courts referenced above, this Court sees no differences between conducting an *in camera* examination and reviewing documents *in camera* that would compel the Court to use something other than the *Zolin* test to determine whether to conduct an *in camera* interview. Rather, Intervenors’ concerns can be adequately addressed by fashioning a procedure for the interview itself that protects the interests of all parties involved. Looking at the efficiency and attorney-client confidentiality concerns set forth by the Seventh Circuit Court of Appeals and adding the concern of grand jury secrecy, the Court concludes that both Intervenors and the Government should be given an opportunity to propose questions to be asked of Attorney by the Court, but that neither side should be present for the examination itself, just as neither side would peer over the Court’s shoulder as the Court reviewed documents *in camera*. This procedure avoids giving Intervenors an unfair preview of potential grand jury testimony, while at the same

the Government’s, gave both the Government and the target an opportunity to submit proposed questions for the examination, and gave the target leave to file a brief regarding the crime-fraud exception’s applicability. *Id.* at 997. In *In re Grand Jury Subpoena*, 419 F.3d 329 (5th Cir. 2005), the Fifth Circuit Court of Appeals noted that the district court had conducted an *in camera* examination of an attorney, but did not describe which parties, if any, were present at the examination or how the examination was conducted.

time protecting privileged information from disclosure to the Government. The Court notes that the grand jury secrecy concerns in this case are somewhat decreased by the prosecution of a parallel case in a foreign jurisdiction and the consequent knowledge of the Intervenors regarding the general nature of the ongoing investigation. Even so, there appears to be a significant amount of information before the grand jury that is not known to the Intervenors. Thus, the secrecy of the grand jury investigation is still entitled to protection by the Court. *See In re Grand Jury Subpoena*, 223 F.3d at 219 (denying client's request for access to government's *ex parte* affidavit, even though the investigation had long been pending and its nature was public knowledge).⁶

Given these protective measures, the Court does not agree that conducting such an examination would intrude upon the independence of the grand jury or put the Court in the shoes of the prosecution. It is crystal clear that the Court does have a role in grand jury proceedings when it comes to the enforcement of subpoenas. *See, e.g., United States v. Calandra*, 414 U.S. 338, 346 n.4 (1974) ("The grand jury is subject to the court's supervision in several respects . . . In particular, the grand jury must rely on the court to compel production of books, papers, documents, and the testimony of witnesses, and the court may quash or modify a [subpoena] on motion if compliance would be unreasonable or oppressive." (internal citations and quotations omitted)); *In re Grand Jury Subpoena*, 223 F.3d at 216. Because the Government will not actually be present at the examination and because both parties will have an opportunity to submit questions for Attorney, the Court fails to see how taking steps to resolve an evidentiary issue while still protecting the confidentiality concerns of both sides could unwittingly turn the Court into an arm of the prosecution.

⁶ For this same reason, the Court will deny Intervenors' request for access to the Government's *ex parte* declaration.

CONCLUSION

For the foregoing reasons, the Court will conduct an *in camera* examination of Attorney to determine whether the crime-fraud exception applies in any way to his privileged relationship with Intervenors. An appropriate Order follows.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE GRAND JURY SUBPOENA	:	G.J. No. 10-127-02
	:	
	:	
	:	
	:	

ORDER
(Redacted)

AND NOW, this 13th day of November, 2012, upon consideration of the Government's Motion to Enforce Grand Jury Subpoena (Docket No. 7), Intervenor's Response (Docket No. 18), the Government's Reply (Docket No. 19), Intervenor's Sur-reply (Docket No. 21), and Intervenor's Post-Argument Brief (Docket No. 22), and following oral argument on October 19, 2012, it is hereby **ORDERED** that:

1. Attorney shall appear for an *in camera* examination in Chambers, Room 10613, on the earliest date to be set at the mutual convenience of the Court and Attorney who may be accompanied by his counsel for the *in camera* examination; and
2. The Government and Intervenor's may submit to the Court proposed questions for Attorney no later than November 16, 2012.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE